89-1874

No. _____

In The

Supreme Court of the United States

October Term, 1989

MESA VERDE CONSTRUCTION CO.,

Cross-Petitioner,

v.

NORTHERN CALIFORNIA DISTRICT COUNCIL OF LABORERS, AND CARPENTERS 46 NORTHERN CALIFORNIA COUNTIES CONFERENCE BOARD,

Respondent.

CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

Did the United States Court of Appeals for the Ninth Circuit, in direct conflict with the intent of Congress as stated in the Court's opinion in *Jim McNeff, Inc. v. Todd*, 461 U.S. 260 (1983) and *NLRB v. Local Union No. 103, Int'l Assoc. of Bridge, Structural and Ornamental Iron Workers* (Higdon) 434 U.S. 335 (1978), err, in a trust fund lawsuit under Section 301 of the Labor Management Relations Act, by deferring to the National Labor Relations Board and adopting its decision in *John R. Deklewa and Sons, Inc.*, 282 NLRB No. 184 (1987) *affirmed sub nom. International Ass'n of Bridge, Structural and Ornamental Iron Workers, Local 3 v. NLRB*, 843 F.2d 770 (3rd Cir.), *cert. denied*, ___ U.S. ___, 109 S.Ct. 222, 102 L.Ed.2d 213 (1988), with respect to section 8(f) of the Act?

Whether the National Labor Relations Board has adopted a construction of rights inconsistent with the intent of Congress and the decisions of the Court, specifically, that a contract formed under section 8(f) of the National Labor Relations Act accords a signatory labor union the rights and privileges of a majority representative under section 9(a) of the Act?

Whether the Court of Appeals for the Ninth Circuit erred in overruling its previous decision in *Royal Development Co. v. NLRB*, 703 F.2d 363 (9th Cir. 1983), to the extent it concluded that it no longer requires an en banc decision of the Circuit to reverse a three judge panel and that three judge panels of the Circuit are not bound by prior decisions of other panels if there has been a change in administrative agency view of statutory construction?

LIST OF PARTIES

1. The names of the parties to this proceeding are those contained in the caption of this case.

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No. _____

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NORTHERN CALIFORNIA DISTRICT COUNCIL OF LABORERS, AND CARPENTERS 46 NORTHERN CALIFORNIA COUNTIES CONFERENCE BOARD,

Respondent.

CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Mesa Verde Construction Company ("Mesa Verde") petitions for a Writ of Certiorari to review the Order and Amended Opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on January 26, 1990.

OPINIONS BELOW

The relevant opinions below are set forth at page 2 of Petitioners' Laborers' and Carpenters' Petition for a Writ

of Certiorari to the United States Court of Appeals for the Ninth Circuit in the connected case of Northern California District Council of Laborers, and Carpenters 46 Northern California Counties Conference Board v. Mesa Verde Construction Co., No. 89-1661 ("Petition") and Appendices A-E thereto.

JURISDICTION

The relevant jurisdictional history is set forth at Petition, page 2. The jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1). The Petition was received on April 30, 1990. This Cross-petition is timely filed under 28 U.S.C. § 2101 and Rule 12.3 of the Court.

STATUTES INVOLVED

The relevant statutory provisions are set forth at Petition, page 2 and Appendix F, with the addition, herein and at Appendix A, of the following:

A. National Labor Relations Act, *as amended*, section(s) 8(a)(5); 8(b)(3); 8(b)(7)(C); 9(a) and 10(b) [29 U.S.C. §§ 158(a)(5); (b)(3); (b)(7)(C); § 159(a) and § 160(b)]

STATEMENT OF THE CASE

The factual statement of this case is fairly set forth in the Petition for Certiorari and in the opinion below.

REASONS FOR GRANTING THE WRIT

More important than the issues of labor law presented by the instant case, the question raised below is

the responsibility of the National Labor Relations Board to follow the decisions and statutory interpretations of the United States Supreme Court, and the role of federal appellate courts in deferring to the NLRB in cases of conflict between the Supreme Court and the NLRB's current opinion. The Courts of Appeal for the Ninth, Third, Seventh and Eighth Circuits[1] have abandoned the traditional balance between the judiciary and the courts by adopting a decision of an administrative agency that purports to overrule Supreme Court precedent and clear statutory construction in the name of administrative convenience. Judge Kozinski, writing in dissent in *Mesa Verde,* en banc, ends his analysis by noting "I can only hope that the Court will have occasion for sober reflection on the wisdom of the approach taken by our court today and by the Third Circuit in *International Ass'n of Bridge, Structural and Ornamental Iron Workers, Local 3 v. NLRB,* 843 F.2d 770 (3rd Cir.), cert. denied, ___ U.S. ___, 109 S.Ct. 222, 102 L.Ed.2d 213 (1988)." The elegiac elegance of Judge Kozinski's plea merits just such consideration by the Court, and, accordingly, it is on those terms that prayer for plenary relief is made.

The Cross-Petition For Certiorari Should Be Granted Because The Decision Of The Court Of Appeals For The Ninth Circuit Directly Conflicts With The Holding And Opinion Of The Court.

In 1977, General Counsel for the National Labor Relations Board argued to the Court in its brief to the United

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[1] *NLRB v. W.L. Miller Co.*, 871 F.2d 745 (8th Cir. 1989); *NLRB v. BUFCO Corp.*, __F.2d___, 1990 WL 37251 (7th Cir. 1990).

States Supreme Court in *NLRB v. Local Union No. 103, Int'l Assoc. of Bridge, Structural and Ornamental Iron Workers* (Higdon), No. 76-719 (October Term, 1976) that " . . . the language of section 8(f) and its relationship to other provisions of the Act reflect that *section 8(f) was not intended to relieve unions that are parties to pre-hire agreements from the obligation to achieve majority support before they can require an employer to honor such an agreement by means of section 8(a)(5). . . .*" [*Id.* at 23-24](emphasis added). While there were other arguable interpretations of Section 8(f) and its legislative history, the United States Supreme Court announced that the Board's position was essentially correct, and stated: "the pre-hire agreement is voidable and does not have the same stature as a collective bargaining contract entered into with a union actually representing a majority of the employees and recognized as such by the employer." 434 U.S. at 341. The Court affirmed the Board's decision that picketing to enforce a pre-hire agreement violated NLRA section 8(b)(7)(C) [29 U.S.C. section 158(b)(7)(C)], as "acceptable" and a "defensible construction of the statute." *Id.* at 341, 350. It is not "acceptable" for the Board to ignore the fact that the Supreme Court in *Higdon* upheld the Board based upon a review of the legislative history of section 8(f), and was not merely reiterating the Board's philosophy.

The Supreme Court embraced this logic and statutory interpretation in the context of a trust fund lawsuit under section 301 of the National Labor Relations Act [29 U.S.C. § 185] in the case of *Jim McNeff, Inc. v. Todd*, 461 U.S. 260 (1983). In *McNeff*, as in this case, the union brought suit under section 301 of the Labor Management Relations Act to enforce a pre-hire agreement. The Court unanimously

affirmed that an employer has an *"undoubted right* to repudiate a pre-hire agreement before the union attains majority support in the relevant unit. . . ." 461 U.S. at 270 (emphasis added). *See also Id.* at 271 ("a section 8(f) pre-hire agreement is subject to repudiation until the union establishes majority status"), *and see Woelke and Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 664 (1981) ("[the employers], if they do not have a stable workforce among whom the union has secured a majority, may be free to repudiate the agreement at any project which the union has not demonstrated that it represents the majority of their employees"). By emphasizing that the Court's jurisdiction derived from section 301, the Court drew a "critical distinction" between the Board's obligation to decide unfair labor practice charges and the Court's obligation to construe the enforceability of collective bargaining agreements under section 301. The Court noted that only the former had been addressed in *Higdon*. The latter was settled in *McNeff. Id.* at 267, *and* at 267 n. 7. See also *Thurston Motor Lines, Inc. v. Jordank, Rand, Ltd.*, 460 U.S. 533, 535 (1983); *Hutto v. Davis*, 454 U.S. 370, 375 (1982) (per curiam). Thus, the meaning of section 8(f) and its legislative history became the finding of the Court.

Only four years after the Court's opinion in *McNeff*, in the case of *John R. Deklewa and Sons, Inc.*, 282 NLRB No. 184 (1987), the NLRB decided, for administrative convenience, to abandon this view of the legislative history. Less than two years after *Deklewa*, the NLRB has likewise abandoned the reasoning behind *Deklewa* in the case of *Laborers' Local Union No. 1184 (NVE Constructors, Inc.),*

296 NLRB No. 165 (1989).[2] Although it is raised in the context of a trust fund lawsuit under Section 301 of the Act, the Court of Appeals for the Ninth Circuit has overruled existing Circuit Court cases and applied the NLRB's view of section 8(f) instead of the Supreme Court's view.[3] The Court must preserve the balance of power between the executive, legislative and judicial branches of government, and remind the agency and Court of Appeals that due process of law includes the principles of *stare decisis*

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[2] As will be set forth later, the NLRB erred in its reasoning in support of the *Deklewa* decision. The first part of the *Deklewa* decision describes well the subsidiary rules and policies developed as a result of the Supreme Court's decision in *Higdon*. In *Deklewa*, the Board found it intellectually difficult to justify a presumption in favor of majority status from the mere passage of time or from the use of exclusive union hiring halls, trust fund benefits, or forced union membership. This lead to the result that all construction agreements which are not supported by card based or other independent pre-signing indications of majority status remain section 8(f) pre-hire agreements until and unless the union wins in an NLRB conducted election or is voluntarily recognized based upon independent evidence of majority status. However, this does not make pre-hire agreement non-voidable, it does not create temporary fictitious 9(a) relationships and it does not mean the Supreme Court's opinions in *Higdon* and *McNeff* can be ignored.

[3] A further reason not to apply *Deklewa* in the context of this section 301 suit is that the Board itself would not and could not apply its decision to the facts of this case. The Board held that *Deklewa* would apply only "to this case and to all pending cases in whatever stage." *Deklewa* at 1389. This case is not now, nor could it ever be, presented for adjudication to the Board. The Board could not accept an unfair labor practice charge under section 8(a)(5) because the six-month statute of limitations has run. NLRA section 10(b) [29 U.S.C. § 160(b)].

and the power of higher courts to mandate to lower courts the outcome of decisions based upon clear rules of precedent. Otherwise, the principle of jurisprudence becomes the mere political whim of the most recent judicial or administrative official to deal with the problem.

McNeff Was A Trust Fund Case In Which The Supreme Court Did Not Defer To Any Agency Ruling. Likewise, In Trust Fund Cases, A Federal Court Owes No Duty Of Deferral To The NLRB, Especially When The Board Rewrites The Act In The Name Of Administrative Convenience Instead Of Interpreting Congressional Intent.

The Court owes no deference to an agency which attempts to engage "in the unauthorized assumption . . . of major policy decisions properly made by Congress." *American Ship Building Company v. NLRB*, 380 U.S. 300, 318 (1965). It is the responsibility of the Court authoritatively to construe statutes, and to reject an agency interpretation which is contrary to congressional intent. *Chevron USA v. Natural Resources Defense Council*, 467 U.S. 837, 843-844 (1984); *FEC v. Democratic Senatorial Campaign Committee*, 454 U.S. 27, 32 (1981). The agency is subject to even greater scrutiny when it abruptly departs from precedent. *NLRB v. Local Union No. 103, International Association of Bridge, Structural and Ornamental Iron Workers, AFL-CIO ("Higdon")*, 434 U.S. 335, 351 (1978); *Lovshin v. Department of the Navy*, 767 F.2d 826, 840 (D.C. Cir. 1985), *cert. denied.*, 106 S.Ct. 1523 (1986); *Frank Diehl Farms v. Secretary of Labor*, 696 F.2d 1325, 1330 (11th Cir. 1983); *NRDC v. EPA*, 683 F.2d 752, 760 (3d Cir. 1982); especially so precedent set by the Court.

Judge Kozinski, in his eloquent dissent to the decision of the Ninth Circuit *en banc*, excerpts from which follow, presented the issue directly.

> "It is emphatically, the province and duty of the judicial department, to say what the law is." Marbury v. Madison, 5 U.S. (1 Cranch) 137, 176, 2 L.Ed. 60 (1803). To MARBURY's ringing pronouncement the majority would add a codicil: "until and unless the agency charged with administering the law changes its mind." According to the majority, if a federal court relies on an agency's interpretation of a statute, the court's construction is binding only until the agency decides the statute means something else altogether. At that point the court, or a higher court, or a lower court, may – nay, must – follow the agency's new interpretation unless that interpretation is unreasonable. This, I respectfully suggest, results in a significant shift of authority from the judiciary to the executive branch. Whenever Congress charges an agency, board, commission or department with administering a statute – I would venture to guess that this includes a substantial majority of our most significant federal laws – the judges become the handmaidens of the agency, relegated to deciding not what the law is, but only whether the agency's construction of the law is reasonable.
>
> This is no small change. Courts and agencies are fundamentally different, both institutionally and functionally. Judicial decision making is hedged about with a variety of constitutional safeguards designed to protect it from manipulation by the political branches. In interpreting statutes, courts are bound to find and apply the meaning endowed them by Congress and the President. It is emphatically not the function of courts to read policy content into statutes, or to interpret them in a way that will

foster a particular political viewpoint. Administrative agencies, by contrast, are designed to bend with the political winds. The leadership and policy direction of executive departments change with every administration; members of so-called independent agencies are appointed with reference to their political affiliations. Agency officials are expected to rely on their views of public policy in carrying out their responsibilities.

Because judges must read a statute in the way that best reflects its meaning, courts are far slower than agencies in overruling their decisions. Once a circuit interprets a statute, only an en banc panel of the same court or the Supreme Court may adopt a different construction; only the Supreme Court may modify or reverse its own prior construction of a statute. By contrast, agencies can change their outlook as often and easily as a chameleon changes its color. A change of administration may prompt an executive department to alter its position on a particular piece of legislation overnight. As positions taken by a regulatory agency may hinge on a narrow majority, appointment of a single commissioner may drastically change the agency's approach to its organic statute.

This difference between the constraints on the judiciary and the broad freedom afforded agencies derives directly from the disparate functions they perform. When courts interpret a statute, they search for its true meaning – and there can never be more than one true meaning. To be sure, reasonable minds may differ as to what that meaning may be; occasionally it may be necessary to correct a judicial decision that misreads that meaning. But in performing their proper function, judges must listen for the voice of the legislature, not to the sound of their own heartbeats. Because courts are bound by the best

construction of the statute, they may alter their interpretation only in response to a powerful new insight as to the law's meaning, not because a different panel of judges prefers a different result.

Agencies, on the other hand, may turn on a dime: Their proper function is to fill in policy gaps pursuant to an explicit or implicit delegation of authority from Congress. See, e.g., *Morton v. Ruiz*, 415 U.S. 199, 231, 94 S.Ct. 1055, 1072, 39 L.Ed.2d 270 (1974) ("[t]he power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress"). Where Congress has delegated such authority, the statute becomes a clear vessel which changes its tint as it is filled and refilled by various policy pigments. Because the agency administering the statute is not bound to a single formulation of statutory language, it may make changes without considering whether the new approach more accurately reflects the meaning of the statute.

Both types of decision making processes serve a vital function so long as each is confined to its own sphere. The majority goes astray in conflating the two. This error has the effect of displacing the courts' methodical, deliberate search for a law's meaning with the policy judgment of a politically responsive administrative agency. This is troubling both as a jurisprudential and as a practical matter.

Jurisprudentially, I am troubled by the majority's implicit holding that the meaning of a statute can change in an instant simply because an administrative agency has said so. Statutory meaning is not a matter of hopes or wishes; it is a fact. In settling on a particular interpretation

of a statute, the court is saying: "This is the meaning that was actually conferred upon this statute by Congress." In reaching that conclusion, the court looks first at the statute's language and structure, but may also rely on the statute's legislative history and the view of the agency charged with its enforcement. A change in the agency's view alters this calculus and may motivate a reviewing court to reconsider the soundness of its prior interpretation. But a change in an agency's position cannot automatically alter the meaning Congress gave the statute years earlier.

By reaching the contrary conclusion, the court is, in effect, holding that statutes have no fixed meaning, that in passing laws Congress approves a range of possible interpretations, each as good as the next. While this approach fits in neatly with the popular mythology, conceived and nurtured in legal academies, that words are incapable of conveying precise concepts, it "undermines the basic principle that language provides a meaningful constraint on public and private conduct." *Trident Center v. Connecticut General Life Ins. Co.*, 847 F.2d 564, 569 (9th Cir. 1988). Needless to say, I disagree with this approach which, in my view, represents a serious abdication of judicial responsibility.

[FN 2] A reassuring inconsistency suggests the majority is not entirely comfortable with its own prescription: Specifically, the majority goes to great pains to demonstrate that Deklewa's interpretation of section 8(f) is not merely permissible, but preferable. Majority opinion at 1132-34. Thus, the court observes that "Deklewa's literal reading of the second proviso [of section 8(f)] is a more likely reading of congressional intent than that given by R.J. Smith," *Id.* at 1132 (emphasis added), and concludes that "[t]he Board's prior rule, allowing repudiation

of such agreements in addition to these explicit statutory protections, has proved unwise." *Id.* at 1133. Such ruminations have no legitimate place within the analytical framework adopted by the majority: If we are bound to follow the Board, we must approve even a poor interpretation of the statute, so long as it falls within the range of permissible meanings. Future courts might be wise to note the majority's concern with what "best serves the interests of employers and employees," id. at 1129, and then do as we do, not as we say.

And this brings me to the practical problems wrought by today's decision. The en banc court's ruling – should it become the law of the land – will make hundreds, perhaps thousands, of laws that have been conclusively interpreted by the courts subject to uncertainty whenever there is a shift in the political winds. A brief survey of recent cases in which the Supreme Court has relied on an agency's interpretation suggests the scope of the problem. (citations omitted) . . . Our circuit has deferred to agency construction of statutes in an equally wide range of cases (citations omitted) . . .

This handful of examples barely hints at the scope of the problem created by today's decision. If deference means blind adherence to the agency's construction as it meanders through the range of non-irrational meanings, federal judges should plan to take a long holiday and observe from afar as the body of federal law develops without their further meaningful input. A change of this magnitude in the relationship between the judicial and executive branches of government should come from the Supreme Court, if it comes at all.

The Board Has Not Construed Section 8(f), It Has Rewritten It

Section 9(a) of the National Labor Relations Act is the equivalent of a Bill of Rights for collective bargaining. It applies, by its terms, after employees have, "by a majority of the employees in a unit appropriate for such purposes" chosen a representative to bargain for them collectively. Section(s) 8(a)(5) and 8(b)(3) of the Act guarantee the freedom to make that choice by identifying coercive or bad faith conduct by both union and employer.

Contracts executed pursuant to section 8(f) of the Act are different from section 9(a) collective bargaining agreements. *Retail Clerk's Int'l Assn. v. Lion Dry Goods*, 369 U.S. 17, 27, 35 (1962). In enacting section 8(f) of the Act, Congress fashioned a limited exception to the principle of employee free choice enforced by sections 8(a) and (b) of the Act. Thus, section(s) 8(a)(2) and (5) forbid an employer from entering into a union agreement without prior evidence of employee support. Section 8(f) validates this otherwise unfair labor practice by permitting an agreement to be reached on a pre-hire basis, *e.g.* before any evidence of union support. In so doing, the Congress clearly indicated that such an agreement must be "purely voluntary" and free of coercion. Unless confirmed by evidence of majority support, pre-*Deklewa* section 8(f) contracts were considered purely executory and repudiable at any time.

In implementing the Congressional mandate represented by section 8(f), the Board considered that the

shifting nature of the construction workforce made elections or a showing of cards, the traditional means recognized in the Act for a demonstration of majority support, impractical. Accordingly, the Board fashioned two additional devices to make employee choice possible. Thus, the doctrines of conversion and merger serve to provide the equivalent of an election by allowing proof that an employer's workforce has the permanent and stable characteristics of a non-construction employer; or if the underlying contract is executed through a multi-employer group, that a overall majority exists in favor of the union, and therefore, the 8(f) contract is considered merged into the larger whole.

Repudiation, merger and conversion were, until *Deklewa*, entrenched and unchallenged Board law. The only controversy was when a merger or conversion occurred. The concepts required an employer to "chart" its workforce, job-by-job and look for a statistically significant portion of employees working on more than one jobsite successively. The trial court in *Mesa Verde* was able to perform this task quite easily. See *Mesa Verde Construction Co. v. Northern California District Council of Laborers*, 598 F. Supp. 1092, 1097-1099 (N.D. Cal. 1984). Not only are the "rules" of then existing Board law on merger and conversion set forth clearly in the first pages of the *Deklewa* decision, but they were widely published and understood by the labor law community. Job-site by job-site employers could repudiate for future jobs only, unless they merged their workforce into the multi-employer group's workforce. *See, e.g., Baton Rouge Building Trades Council v. E.C. Schaffer*, 657 F.2d 806 (5th Cir. 1981); Thierman & Pattison, *Lowest Responsible Bidder*, (1985). These rules

have been adopted by the Court, under the mandate it itself laid out in *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), as permissible constructions of the Act.

The *Deklewa* rule abandons the doctrines of repudiation, merger and conversion. In their stead, the Board has altered the mechanisms by which elections may be sought under the Act, by concluding that the contract bar rule does not apply, and therefore employers may call for decertification elections at any time without showing proof of employee dissatisfaction with the union. This is a useless slight of hand, since the union is by definition a minority representative and existing Board law before *Deklewa* allowed an employer to file a petition for an election anytime anyway. See *Albuquerque Insulation Contractor*, 256 NLRB No. 15 (1981)[4]

In *Deklewa*, the Board abandoned the statutory construction it had urged before the Supreme Court in *Higdon*, and held that, in all respects, 8(f) agreements are fully enforceable by Section(s) 8(a)(5) and 8(b)(3), as are traditional collective bargaining agreements under the Act.[5] The NLRB also implied in *Deklewa*, that unions

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[4] The pre-*Deklewa* reason for an employer to file for an election was that then the NLRB would make the initial determination that the contract was a pre-hire agreement and no conversion or merger had occurred. The Union could always file an unfair labor practice charge if it believed the contract was not a pre-hire agreement.

[5] This position is somewhat disingenuous as to unions who decide to "disclaim" and then renounce the section 8(f)

(Continued on following page)

could not picket to obtain an employer's signature to a pre-hire agreement, since pre-hire agreements had to be voluntarily entered into, although in a more recent decision, the Board has retraced its steps on that point, limiting issuance of complaint under section 8(b)(7), in contradictory fashion, to situations where there are no unit employees or the picketing for a pre-hire agreement has exceeded 30 days. See *NVE Constructors, Inc., supra.*

The Board's pronouncement in *Deklewa*, that section 8(f) contracts are no longer (or were never) repudiable, and that henceforth pre-hire agreements will be enforced during their term under section(s) 8(a)(5) and 8(b)(3) without regard to whether the union actually achieves status under section 9(a) as the majority representative contradicts the plain language of the statute. Section 8(f) provides that "it shall not be an unfair labor practice under subsections (a) and (b)" for a construction industry employer to enter into an agreement with a union whose majority status has "not been established under the provisions of section 9 of this Act *prior to the making of such agreement. . . .*" *See also* S. Rep. No. 187 at 55, 1 Leg. Hist. 451; H. Rep. 741 at 50, 1 Leg. Hist. 808 (emphasis added). (Section 8(f) "[m]akes clear that it is not an unfair labor practice for an employer . . . to *enter into* [pre-hire agreements] . . . without the union's majority status having

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(Continued from previous page)

agreement. The NLRB still believes the relationship between a union and the employees to be such a critical element of the collective bargaining relationship that the union that does not "represent" employees can repudiate. Moreover, 8(f) agreements, even after *Deklewa*, are not binding on employers without employees. See e.g., *Stack Electric*, 290 NLRB No. 73 (1988).

been established. . . . "). Nothing in section 8(f) intended pre-hire agreements to be enforced in the same manner as collective bargaining agreements under section 9(a).[6]

Just a few years ago, the NLRB believed that Congress wanted pre-hire agreements to be purely voluntary and "at will" for the duration of a jobsite or until the union became the majority representative of employees. The NLRB and the courts were keenly aware of the power of construction unions to engage in top down organizing. Congress having legitimized the industry practice of union only projects through the construction industry proviso to section 8(e), the NLRB developed the law of pre-hire abrogration to prevent contracts of adhesion and to avoid trying issues of fraudulent or coercive inducement. *See Woelke and Romero Framing, Inc. v. NLRB,* 456 U.S. 645, 665 (1981). In its brief to the Court in *Higdon,* the

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[6] A more plausible holding, consistent with the decisions of the Court and the legislative history, would affirm Congress' intent that all contracts in the construction industry are considered pre-hire and "at will". Let the union that seeks the benefit of a section 9(a) relationship come forward to file for an election. The Board's pre-*Deklewa* position is similar to the common law concepts of capacity to contract. A minor, who lacks the legal capacity to contract, can void any contract, but can continue to receive goods and services as long as the minor pays for goods and services already received. In the pre-hire context, the union lacks the capacity to enter into a binding contract, but the employer must honor the contract for the job or project, and must continue trust fund contributions until notice is given to prevent third party reliance. *Deklewa* has created a fictitious capacity in a minority union to enter into binding contracts not envisioned in the Act, permitting them an unequal bargaining position in establishing a permanent relationship with an employer.

General Counsel emphatically affirmed that the statute, as written, compelled the Board's result: section 8(f) did not create 9(a) rights.

> [T]he issue in [*Higdon* is] whether Section 8(f) itself establishes that a union signatory to a pre-hire agreement shall be deemed by operation of law to be the recognized bargaining representative of all employees subsequently hired *until the agreement expires or the union is ousted by an employer – initiated board election.* As we demonstrate below, *neither the language of section 8(f) nor its legislative history supports that conclusion,* or in any way suggests that Congress intended so sweeping a qualification of the Act's major premise that employees shall be represented by bargaining agents of their own choosing. [Br. of the Board in *Higdon,* pp. 18-19.]
>
> *Nothing in the language of Section 8(f),* however, suggests that it was designed to confer upon a union that is a party to a pre-hire agreement the kind of representative status that *would support a Section 8(a)(5) bargaining order against an employer* who refused to bargain with it. . . . *Indeed the language and structure of the Act suggests precisely the opposite.*
>
> Significantly, Congress in 1959 did not, in section 8(f) or elsewhere modify section 8(a)(5), which makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees, *subject to the provisions of section 9(a)*" [emphasis in original]. [*Id.* at 22-23.]
>
> In short the language of section 8(f) and its relationship to other provisions of the Act reflect that *section 8(f) was not intended to relive unions that are parties to pre-hire agreements from the obligation to achieve majority support before they can require an employer to honor such an agreement*

> *by means of section 8(a)(5). . . . [Id.* at 23-24] (emphasis added).

For many years, union advocates have urged Congress to alter the special character of 8(f) contracts to make them instantly enforceable, upon execution. In *Deklewa,* as affirmed in *Mesa Verde,* the Board did what the Congress would not. Indeed, just this point was made to the Court by the General Counsel in *Higdon:*

> The legislative history of Section 8(f)) confirms that Congress did not intend its authorization of prehire agreements in the construction industry to confer automatic representative status or to obviate the union's obligation to acquire majority support. Congress rejected a proposal that would have permitted the Board to certify a union signing a prehire agreement as the employees' representative without an election or other proof of majority support merely upon a showing of a history of bargaining between the union and the employer. [*Id.*] [See Section 702 of H.R. 8400, 86th Cong., 1st Sess., 1 Leg. Hist. 678-79 (1959); 105 Cong. Rec. 6431, 15, 541-42, 17, 899, 18, 135 (1959)].

The effort continues in Congress to this day. See e.g., H.R. 281, 100th Cong., 1st Sess. That, it is submitted, is where it belongs.

Only An En Banc Panel Of The Court Should Have The Ability To Alter Established Circuit Precedent In Order To Ensure The Stability Of Our Laws And Reduce Unjustified Appeals, And The NLRB Is Not Entitled To Any Special Exemption.

The Ninth Circuit has long held that a decision of a three judge panel may only be reversed en banc. "[U]nder the long standing practice of this court, a panel may not overrule a prior decision." *Charleston v. United States,* 444

F.2d 504 at n. 3 (9th Cir. 1961) (citing 9th Cir. Rule 23, 28 U.S.C.). A majority of other circuits have followed the same practice. *See* En Banc Proceedings, 37 ALR 274, §5. (Second, Third, Fourth, Fifth, and District of Columbia Circuits.)

The en banc panel has now unwisely departed from this principle, known in the Circuit as the *Royal Development* rule. (*Royal Development Co. v. NLRB*, 703 F.2d 363, 369 (9th Cir. 1983)), *citing NLRB v. J. Weingarten, Inc.*, 485 F.2d 1135 (5th Cir. 1973), *rev'd*, 420 U.S. 251, 95 S.Ct. 959, 43 L.Ed.2d 171 (1975). This departure is particularly unsound with regard to Circuit decisions adopting or rejecting Board law in the typical case because the Circuit court functions as a court of first resort for the purposes of judicial review. In actions arising, as does this one, under section 301, the trial court exercises its original jurisdiction in interpretation of the Act in the enforcement of collective bargaining agreements, subject to the consent of the Circuit. As the Ninth Circuit observed in *Royal*, this jurisdictional mandate is consistent with sound

> [p]olicy reasons for refusing to adopt a Board decision that conflicts with our earlier precedent absent an en banc convening of the court. In effect, the Board would be free to "reverse" circuit decisions whenever its membership changed, thus relegating the courts of appeal to a minor supervisory role over the Board. This, we believe, would be inconsistent with our legislative process.

Id., 703 F.2d at 368.

The fundamental error in *Mesa Verde's* adoption of *Deklewa* is that it is premised on a false belief that the

Board may alter the rights created by the Act in discharging its duty to implement and interpret. The historical charge of appellate courts, identified so clearly by Judge Kozinski, is to isolate and correct such errors. Facilitating their commission by permitting a variation of the en banc rules invites a compromise of the essential guarantee of justice which the Court exists to preserve.

CONCLUSION

For the above stated reasons this cross-petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

SUBCHAPTER IV – LIABILITIES OF AND RESTRICTIONS ON LABOR AND MANAGEMENT

§ 158. UNFAIR LABOR PRACTICES

(a) It shall be an unfair labor practice for an employer –

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

(b) It shall be an unfair labor practice for a labor organization or its agents –

(3) to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 9(a);

(7) to picket or cause to be picketed, or threaten to picket or cause to be picketed, any employer where an object thereof is forcing or requiring an employer to recognize or bargain with a labor organization as the representative of his employees, or forcing or requiring the employees of an employer to accept or select such labor organization as their collective bargaining representative, unless such labor organization is currently certified as the representative of such employees:

(C) where such picketing has been conducted without a petition under section 9(c) being filed within a reasonable period of time not to exceed thirty days from the commencement of such picketing: *Provided*, That when such a petition has been filed the Board shall forthwith, without regard to the provisions of section 9(c)(1) or the absence of a showing of a substantial interest on the part of the labor organization, direct an election in such unit as

the Board finds to be appropriate and shall certify the results thereof: *Provided further,* That nothing in this subparagraph (C) shall be construed to prohibit any picketing or other publicity for the purpose of truthfully advising the public (including consumers) that an employer does not employ members of, or have a contract with, a labor organization, unless an effect of such picketing is to induce any individual employed by any other person in the course of his employment, not to pick up, deliver or transport any goods or not to perform any services.

Nothing in this paragraph (7) shall be construed to permit any act which would otherwise be an unfair labor practice under this section 8(b).

§ 159 REPRESENTATIVES AND ELECTION

Sec. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided,* That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: *Provided further,* That the bargaining representative has been given opportunity to be present at such adjustment.

§ 160 PREVENTION OF UNFAIR LABOR PRACTICES

Sec. 10. (b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: *Provided*, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the

United States pursuant to the Act of June 19, 1934 (U.S.C., title 28, secs. 723-b, 723-C).